

**BEFORE THE COPYRIGHT ROYALTY TRIBUNAL**

**WASHINGTON, D.C.**

In the Matter of )  
 )  
1984 Jukebox Royalty ) Docket No. 85-1-84JD  
Distribution Proceeding )

OPPOSITION TO MOTION FOR PROCEDURAL RULING

Asociacion de Compositores y Editores de Musica Latino-americana ("ACEMLA"), by its attorneys, hereby opposes the February 27, 1986 "Motion for Procedural Ruling" filed by the American Society of Composers, Authors and Publishers ("ASCAP"), Broadcast Music, Inc. ("BMI") and SESAC, Inc. (collectively "ABS"). ABS's motion requests that the Copyright Royalty Tribunal ("Tribunal") modify its Notice of Declaration of Controversy in the above-referenced proceeding (50 Fed. Reg. 47794, published November 20, 1985) to split the proceedings into two "phases"; the first to determine ACEMLA's status as a performing rights society and the second to determine entitlement, "if necessary."

1. ACEMLA strongly opposes the motion. ABS's proposed procedure contemplates that the Tribunal first take evidence and hold hearings on ACEMLA's status as a performing rights society. If the Tribunal determines ACEMLA's status favorably then, and only then, will ACEMLA be allowed to go onto the next "plateau"

wherein the Tribunal will take evidence and hold hearings on all the parties' entitlement.

2. In support, ABS disingenuously argues that their proposal follows "the logical structure of the Tribunal's 1982 and 1983 jukebox royalty distribution decision"; that ABS's members would be spared the "considerable cost of evidentiary submissions" as to their entitlement and "the Tribunal would not have to conduct needless hearings or waste its time with evidence it need not consider."

3. Addressing the latter two arguments first, if ABS went to "considerable cost" in submitting evidence of their entitlement, it must have been elsewhere and not in the 1982 and 1983 Jukebox Royalty proceeding. In that proceeding, the total submissions of ASCAP, BMI and SESAC relating to their entitlement consisted of a list of their Latin American affiliates; partial lists of their most performed Latin songs and best known Latin artists; a 1976 issue of BMI's public relations publication "The Many Worlds of Music"; four half-page charts analyzing Billboard and Replay charts; and a list of ABS's most performed Latin works in 1982 and 1983. If the three societies went to "considerable expense" to submit a copy of a 1976 BMI publication and a few lists, their members have every right to call for an audit by an independent accounting firm. In sum, ABS went to very little expense to prove their own entitlement; their ex-

penses were incurred in attempting to refute ACEMLA's entitlement.

4. Second, ACEMLA submits that the procedure taken by the Tribunal in the 1982-1983 proceeding did not result in "needless hearings" or the Tribunal wasting "its time with evidence it need not consider." The overwhelming majority of the record testimony at the hearing dealt with ACEMLA's status and entitlement including attempts to rebut its claim by ASCAP and BMI's witnesses. Very little of the record testimony deals with ABS's entitlement per se. Further, since the Tribunal did not consider ABS's minimal showing on entitlement, it wasted no time on it. Therefore, if the Tribunal wishes to inquire into ACEMLA's status in the 1984 proceeding, the Tribunal will presumably have to "waste its time" with similar submissions and testimony no matter what procedure is used.

5. However, it is with respect to entitlement that ABS's motion is really directed. ABS's motion, which ostensibly is couched in public interest concerns such as lessening the Tribunal's burden and reducing the parties' "expenses", is a blatant attempt to structure the 1984 proceeding so as to effectively prevent ACEMLA's members from receiving any share of the 1984 fund, despite the fact that there is a high degree of probability that they are entitled to some portion of it.

6. In the 1982 and 1983 proceeding, ACEMLA withdrew the claim of its parent corporation publishing company, Latin

American Music Co., Inc., and consolidated that claim into ACEMLA's claim as a performing rights society, Final Determination of the Distribution of the 1982 (Remand) and the 1983 Jukebox Royalty Funds, 50 Fed. Reg. 47577 at 47578. After consideration of the record in that proceeding, the Tribunal rejected ACEMLA's claim as to its status but recognized that "Latin American Music Co., Inc. has been successful in placing before the Tribunal evidence which, in total, establishes the likelihood of jukebox play which deserves some minimal award." While noting that as a result of its conclusion as to ACEMLA's status, "procedurally, . . . LAM would be entitled to no award," the Tribunal made an award to Latin American Music Co., Inc. "in order to recognize the reality of jukebox play in 1982 and 1983 and to compensate those copyright owners whom Latin American Music Co., Inc. represents for the royalties which they have earned." Id. at 47582.

7. While ACEMLA strongly disagrees with the Tribunal's conclusions as to its status and the amount of the award (and, in fact, appealed the Tribunal's Final Determination to the U.S. Court of Appeals, ACEMLA v. CRT, Case No. 85-1804), it does not disagree with the Tribunal's real-world and equitable view that, regardless of whether a party files a claim as a copyright owner not affiliated with a performing rights society, pursuant to 17 U.S.C. Section 116(c)(4)(A), or as a performing

rights society, pursuant to 17 U.S.C. Section 116(c)(4)(B), the Tribunal must determine the basic question as to whether the copyright holder represented by the claimant is entitled to royalties earned by play in jukeboxes.

8. Apparently ABS does not agree. Its instant motion represents a clear attempt to prevent the Tribunal from recognizing the "realities of jukebox play" and from compensating copyright owners for "the royalties they have earned." Under ABS's proposal, a Tribunal determination that ACEMLA was not a performing rights society in 1985 would, because of its claimed status, have the simple effect of denying ACEMLA's members claims for all time, without ever determining whether its members, the copyright holders themselves (the real beneficiaries), have any entitlement to royalties. To quote the United States Court of Appeals in ACEMLA v. CRT, 763 F.2d 101 (2nd Cir. 1985) at 108:

In granting the CRT authority to establish royalty fees for blanket licenses for all jukeboxes in the country and to distribute the net proceeds from those claimants Congress intended the agency to function with wide discretion and to develop, within the statutory framework, procedures that would fairly compensate copyright owners for the use of their songs on licensed jukeboxes.

. . . Congress also sought to make the work of the CRT as uncomplicated and free of technical proceedings as it could, consistent with the rights of claimants. Not precise adjudication, but fairness and rough justice seem to have been the congressional objectives established by the 1976 amendment....

9. ABS's proposal is not only inconsistent with the Court's perception of Congressional objectives, it appears also to be inconsistent with the mechanisms set up by the Act and the Tribunal's rules, 37 C.F.R. 301 et seq. Section 305.3, Content of Claims, does not require a claimant to indicate its status. Further, Section 301.72(b) provides that, after October 1 of each year, the Tribunal shall determine whether a controversy exists among claimants with respect to jukebox royalty fees. Section 305.4, Justification of Claims, requires that claimants specify their claimed proportionate share of the fund and provide a detailed justification of that claim. However, there is no requirement that the claimant choose for all time its status as claimant.

10. The significance of a claimant's status only arises in the distribution of the royalty fund, which would come after the CRT conducts a proceeding to determine the distribution of royalty fees. See 17 U.S.C. Section 116(c).

11. The point of the foregoing discussion is that neither the Copyright Act nor the Tribunal's rules contemplate that a claimant definitively elect a particular status for all time in any proceeding and thereby risk the absolute foreclosure of any compensation for royalties earned due to its election. Rather, the Act, the Tribunal's rules and legislative objectives contemplate that claims are filed, a controversy declared, claims are justified, a proceeding held, and then the Tribunal determines

the statutory distribution based on its consideration of the evidence. ABS's proposal is not only inconsistent with the congressional objective of "fairness and rough justice" as opposed to "precise adjudication", but would prevent the Tribunal from performing its mandated duty to fairly compensate copyright owners and would unjustly penalize ACEMLA's members. It is for this precise reason that ABS's proposed procedure is inherently different from the "structure" of the 1983 and 1983 proceeding.

12. Finally, let us examine the schedule proposed by ABS on pp. 6-7 of their motion. Does this really seem less of a burden to the Tribunal and the parties? Ignoring the incredible time constraints proposed (Reply findings due four days after the Proposed Findings in Phase I with some parties in New York and others in Washington, D.C, necessitating service by mail), if ACEMLA is determined to be a performing rights society, the schedule contemplates four separate sets of hearings, two sets of Proposed Findings, two sets of Reply Findings and two separate Decisions by the Tribunal! ABS's bifurcated proposal appears to be a greater burden and expense on the Tribunal, not to mention parties with less wealth than ABS. Furthermore, implementation of ABS's proposal is totally unnecessary. Both questions of status and entitlement can be easily addressed in one single proceeding as they were in previous proceedings.

13. In conclusion, ACEMLA vigorously opposes ABS's motion proposing a two stage process for the 1984 Jukebox Royalty pro-

ceeding because (1) it arbitrarily mandates a procedural hurdle which would deprive copyright holders of their rightful compensation; (2) is inconsistent with the Congress' intentions, the Copyright Act and the Tribunal's rules; and (3) is actually more burdensome and expensive to the Tribunal and the parties.

WHEREFORE, for the foregoing reasons, ACEMLA respectfully requests that ABS's Motion for Procedural Ruling be denied.

Respectfully submitted,

ASOCIACION de COMPOSITORES y  
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CERTIFICATE OF SERVICE

I, Joanne K. Lee, a secretary in the law firm of Shrinsky, Weitzman & Eisen, P.C., do hereby certify that on this 7th day of March, 1986, I sent a copy of ACEMLA's "Opposition to Motion for Procedural Ruling", via United States first class mail, postage prepaid, to each of the following:

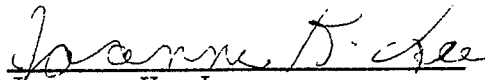
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